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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

AARON WESTENDORP,
A Minor with Disabilities, et al.,

Petitioners,

-versus-

JESSE "THE BODY" VENTURA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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STATUTES

42 U.S.C. §1988 1

In an attempt to evade review by this Court, respondents resort to the usual tactics to hide the certworthiness of the decision below. Most glaringly, respondents repeatedly assert that "[t]he constitutionality of the State's rule has never been decided, pre- or post-*Agostini*" (Opp. 27 n.16),[1] when in fact the Eighth Circuit *squarely held* that "Minnesota Rule 3525.1150 ... violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement." Pet. App. 122a-123a. Other examples of distortion by respondents abound. For instance, the Eighth Circuit's *legal* ruling that petitioners, despite having obtained an injunction and consent decree against the State of Minnesota, were not "prevailing parties" under 42 U.S.C. §1988 becomes, in respondents' description, merely an amalgam of "intensely *factual* determinations." Opp. 2 (emphasis added). Also, despite the Eighth Circuit's agreement with respondents' position that a fee award would be improper because respondents had "no choice but to follow *Aguilar* [v. *Felton*, 473 U.S. 402 (1985),]" until that decision was formally overruled in *Agostini* v. *Felton*, 521 U.S. 203 (1997), (Pet. App. 24a), respondents now baldly assert that "whether *Agostini* 'changed the law' is not relevant to the fee decision." Opp. 26 n.15.

Such attempts to distort the record and decision below so as to minimize the significance of the questions presented might well be expected from a respondent in this Court. And in the ordinary case, a denial of review by this Court carries no collateral consequences for the legal system. Here, however, failure to grant review would leave in place a substantial impediment to the enforcement of civil rights of *all* kinds – including essential protections against race and gender discrimination, for example – by depriving civil rights counsel of

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[1] *Accord* Opp. 22 ("[N]either the Eighth Circuit nor the district court in the present matter ever ruled on the constitutionality of the underlying State Rule."); *id.* 27 ("The constitutionality of the underlying State Rule ... has never been decided."); *id.* at 23 n.14 ("[P]etitioners sought to have the State rule declared unconstitutional but never obtained such a decision.").

their attorneys fees *even where, as here, they succeed in proving violations of federal rights*. The Court should rectify this situation at once.

1. That the decision below will radically diminish incentives to bring the cases essential to adequate enforcement of constitutional and civil rights cannot be denied – and, in point of fact, is *not* denied by respondents. Congress enacted fee-shifting statutes, such as §1988, "to *encourage* individuals injured by [infringements of their civil rights] to seek judicial relief." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (emphasis added). This is because private litigation, often brought by impecunious plaintiffs such as petitioners, is necessary to maintain adequate enforcement of federal rights. Obviously, these cases will not be brought to the extent desired by Congress if the plaintiff's attorney can emerge victorious but nevertheless be denied an award of fees (which is why the "basic philosophy of §1988" is that "fee and merits liability run together," *Kentucky v. Graham*, 473 U.S. 159, 171 (1985)). That, however, is precisely the result mandated by the decision below – a holding of broad import for *all* civil rights litigation.

The Eighth Circuit's rule allows civil rights violators to avoid all fee liability. As long as the defense can point to an "intervening" decision favorable to the plaintiff (Pet. App. 16a), it can, under the decision below, settle the case and thereby escape its fee obligations. In that circumstance, the plaintiff's victory will be "because of" the intervening decision, not the lawsuit, and no fees need be paid, provided the defense settles quickly enough to prevent a court decision applying the intervening precedent (which undeniably would give the plaintiff prevailing party status). *Id.* By thus allowing *defendants* to control when they will (and will not) face liability for attorneys fees, the Eighth Circuit's rule will decrease the incentive for plaintiff's counsel to bring civil rights cases. The impact of this disincentive will be most severe in cases such as this one, where plaintiffs have *meritorious* civil rights claims because the

stronger those claims are, the more likely a civil rights violator is to use an "intervening decision" exception.[2]

As if that were not bad enough, the decision below creates a broad precedent allowing civil rights attorneys to be *completely* denied *any* award of fees if, in hindsight, a judge believes that they prosecuted their client's case too vigorously. Instead of taking the usual approach of awarding "reasonable" fees but denying any fees that are unreasonable, *see Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the court below held that any excessiveness defeats recovery even of fees that were reasonably incurred and essential to the favorable outcome. *See* Pet. App. 26a-28a.

The Eighth Circuit's inequitable rule threatens to transform §1988 from a viable mechanism for enforcing federal rights into a Catch-22 for the unwary attorney. Unless set aside, that rule will treat zealous prosecution of a civil rights case as a basis for denying fees *entirely*. Because there is no bright line after which incremental efforts on a client's behalf exceed "acceptable bounds of advocacy" (Opp. 29), civil rights attorneys will have the perverse incentive to curtail their efforts on behalf of their clients or, even worse, to redirect their efforts to cases for corporate or other clients that can afford to pay market rates for legal services. Either way, the result is underenforcement of federal rights and reduced incentives for state actors to obey federal law – results that fly in the face of sound public policy

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[2]The Eighth Circuit went so far as to hold that even where a plaintiff's case is so strong under prior law as to make victory "*inevitable*," the defendant can avoid fee liability by settling immediately following an intervening precedent confirming the plaintiff's right to relief. Pet. App. 18a n.4 (emphasis added) (joining *Guglietti v. Sec., HHS*, 900 F.2d 397 (1st Cir. 1990), in rejecting "inevitable victory" theory); *but see Perket v. Sec., HHS*, 905 F.2d 129 (6th Cir. 1990) (adopting "inevitable victory" theory). Here, even apart from *Agostini*, respondents' defeat was inevitable: their first three defenses were rejected by the Eighth Circuit based entirely on pre-*Agostini* evidence and law, and their sole remaining merits defense, the Establishment Clause defense, was ruled "highly questionable" under pre-*Agostini* law. Pet. App. 122a.

and the legislative intent of §1988.[3] This Court should grant certiorari or, at a minimum, call for the views of the Solicitor General on these important issues affecting the efficacy of the federal civil rights enforcement scheme.

2.a. The sum total of respondents' answer to the first Question Presented – whether *Agostini* changed Establishment Clause jurisprudence – is buried in a footnote. *See* Opp. 26 n.15. As shown in the Petition (Pet. 18-19), the Eighth Circuit necessarily concluded that *Agostini* did in fact change the law – a conclusion that utterly flouts *Agostini*'s specific holding that "it was *Zobrest* [v. *School Catalina Foothills District*, 509 U.S. 1 (1993)] – and not this case – that created 'fresh law.'" 521 U.S. at 225. Tellingly, even respondents do not try to reconcile this Court's own assessment of *Agostini* with the Eighth Circuit's.

All respondents can muster in defense of this holding below is that "[t]he questions [sic] of whether *Agostini* 'changed the law' is not relevant to the fee decision." Opp. 26 n.15. We wholeheartedly agree that a *favorable* new precedent should not disqualify plaintiffs from recovering fees, but the Eighth Circuit ruled otherwise. The court held a fee award improper because "until the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*." Pet. App. 24a. Obviously, then,

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[3]The situation becomes more bizarre still when combined with the Eighth Circuit's "intervening decision" exception: The plaintiff can accept a settlement offer only by running the risk that fees will not be recoverable (because the defendant can claim that intervening precedent, not the litigation, caused the settlement), but if the plaintiff rejects a settlement offer and continues to litigate, the plaintiff runs the same risk (because the plaintiff's fees will be deemed "excessive" and hence unrecoverable). Interestingly, what the Eighth Circuit thought *made* the hours of petitioners' counsel excessive was the fact that counsel knew that *Agostini* was pending in this Court and that the resulting decision would be relevant to respondents' Establishment Clause defense. Pet. App. 24a. Clearly, however, counsel's hope that the eventual decision in *Agostini* might further refute one of respondents' several affirmative defenses was no reason to *cease* zealously litigating his client's meritorious claims, including discovery aimed at proving those claims.

the Eighth Circuit *did* view *Agostini* as a break from prior law – precisely the view that *Agostini* rejected.[4]

b. The Eighth Circuit's view also contravenes the rule of *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993), that this Court's decisions are entitled to full retroactive effect. *See* Pet. 13-19. Again unable to deny the rule invoked by petitioners, respondents can only assert that "the lower courts in the present case applied *Agostini* retroactively." Opp. 25-26. That, of course, is simply not true – which explains why respondents refer to *Agostini* as "new law." Opp. 21.

If the court below had followed *Harper* and treated *Agostini* as if it were the law "as to all events, regardless of whether such events predate or postdate" *Agostini* (509 U.S. at 97), it would have been required to treat *Agostini* as if it *predated* the litigation. Had it so treated *Agostini*, this case admittedly would have been governed by the "general rule [that] when a party 'settles with government authorities following the commencement of a citizen suit, it is permissible to infer that the citizen suit motivated the settlement.'" Pet. App. 15a. Instead, the Eighth Circuit deemed that rule inapplicable based on the "intervening" nature of *Agostini* (Pet. App. 16a) and, in doing so, flouted *Harper*'s holding that, even in the case of overrulings, decisions of this Court declare not only what the law is, but also what it *always was*.

c. This Court should not tolerate such flagrant disregard for its precedents. Even if full review is not deemed necessary here, the Court should summarily vacate and remand this case for reconsideration in light of the holding in *Agostini* that it did not create new law and *Harper's* mandate that *Agostini*

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[4]Respondents protest (Opp. 26 n.15) that the Eighth Circuit considered *Agostini* only "as a factual matter in determining the impact of this litigation on the conduct of the state." What respondents overlook, however, is that it would have been impossible to conclude that the State abandoned its "position that the case was controlled by *Aguilar*" *because* of *Agostini* unless *Agostini* changed the controlling rule. Pet. App. 16a.

be treated as preexisting precedent. *See* R. Stern, *et al.*, *Supreme Court Practice* §5.12(c), at 251 (7th ed. 1993) (explaining that "summary disposition is appropriate to correct clearly erroneous decisions of lower courts") (citing cases).

3. In addition, plenary review is needed to determine the validity of the Eighth Circuit's new "intervening decision" exception to §1988. As shown in the Petition (Pet. 19-29), such an exception is not only unprecedented, but also contrary to decisions from other circuits. Respondents again resort to denying the plain import of the Eighth Circuit's decision, arguing that the court "d[id] not hold that an intervening favorable decision deprives a party of prevailing party status." Opp. 22. As shown above, however, the fact that *Agostini* intervened (and, in the Eighth Circuit's view, changed the law) was the cornerstone of the court's holding that petitioners were not entitled to fees.[5]

Respondents try to distinguish the circuit cases that found prevailing-party status despite intervening precedents favorable to the plaintiff. *See* Opp. 19-22. But this effort only highlights the grave threat posed to the integrity of the civil rights enforcement scheme by the rule adopted below, which leaves it to the *defendant* to determine a plaintiff's entitlement to a fee award where intervening legal developments occur.

In the rare case where the defendant forthrightly admits it changed its conduct because of the litigation, the plaintiff will get the benefit of the intervening decision in determining fee eligibility. *See Associated Builders v. Orleans Parish Sch. Bd.*,

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5The court below cited additional factors in its discussion of "special circumstances," including the amount of fees claimed (which the panel thought too large) and the potential availability of fees against other co-defendants (which the panel thought a reason for denying fees entirely). Pet. App. 23a-30a. These factors are makeweight: As noted above, if the fee claim were excessive, that would be a reason to reduce the *size* of the award, not to deny fees entirely. Similarly, the potential availability of fees from co-defendants might go to the size of a fee award against the State versus other defendants, but cannot excuse the State from all fee liability given the consent judgment and injunction entered against the State and the Eighth Circuit's holding that the State's rule violated petitioners' constitutional rights. Pet. App. 122a-123a.

919 F.2d 374, 378 (5th Cir. 1990). If the defendant chooses to continue resisting the plaintiff's claim despite intervening precedent confirming the plaintiff's right to relief, as in *Perket*, 905 F.2d 129 (6th Cir. 1990), the plaintiff can receive fees. But where, as here, a defendant gives up in the immediate wake of such an intervening development and writes self-serving letters claiming it settled because of "new law," the defendant can escape its fee obligations.[6]

Under §1988, fee awards must depend not on strategic conduct by the defendant, but on the results achieved by the plaintiff. *See, e.g., Farrar* v. *Hobby*, 506 U.S. 103, 111 (1992) ("[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some of the relief on the merits of his claim," whether by way of "an enforceable judgment against the defendant" or "comparable relief through a consent decree or settlement."). Thus, in addition to diluting the strong incentives Congress intended for civil rights cases, the Eighth Circuit's "intervening decision" exception to §1988 distorts the proper focus of the fee inquiry under *Farrar*.

Unquestionably, petitioners satisfied the *Farrar* standard. They won an enforceable settlement and injunction against the State that prohibited enforcement of its rule (just in time for the new school year) and obligated the State to secure a prompt repeal of the rule. In addition, petitioners won a judgment by the Eighth Circuit that the rule is unconstitutional. These favorable results materially altered the legal relationship between petitioners and the State and thus conferred prevailing party status. *See Farrar*, 506 U.S. at 113 ("[M]aterial alteration of the legal relationship between the parties occurs [when] the *plaintiff*

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[6]Respondents' attempted distinctions of these decisions (and the others cited in the Petition, Pet. 19-26) are entirely artificial, as can be seen by asking a simple question: *Would the results in those cases have been the same had those courts applied the rule of the Eighth Circuit in this case?* The answer is plainly no. In each case, the defendants relied (much more reasonably than respondents did here) on prior law but were nevertheless required to pay attorneys fees.

becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.") (citation omitted; emphasis added); *see also Maher* v. *Gagne*, 448 U.S. 122, 129 (1980) ("The fact that [petitioners] prevailed through settlement rather than through litigation does not weaken [their] claim to fees.").

The Eighth Circuit was able to deny attorneys fees only by complicating the circuit split noted in *Friends of the Earth* v. *Laidlaw Environmental Services*, 120 S.Ct. 693, 711-12 (2000), over the continued vitality of the "catalyst" theory. The circuits previously divided over whether that theory (which focuses on the reasons why a defendant, in cases mooted short of an enforceable judgment or settlement, *voluntarily provides* plaintiff's requested relief) survives *Farrar* (which focuses on the results obtained by a plaintiff through an enforceable judgment or settlement). *Id.* The Eighth Circuit, however, has now complicated matters by ruling that, even where a plaintiff satisfies *Farrar* through an enforceable settlement or consent decree, that plaintiff cannot recover fees as a matter of law *unless* he can *also* prove that the litigation (as opposed to intervening precedent or some other cause) was the catalyst for the defendant's decision to negotiate the settlement or consent decree. *See* Pet. App. 14a ("Thus, as we read *Farrar* ... not only must the plaintiff have obtained relief through a judgment or settlement but also the lawsuit must be a catalyst of legal change favorable to the plaintiff."). The Eighth Circuit's remarkable new "*Farrar*-plus-catalyst" rule makes it much more difficult for civil rights attorneys to recover fees in cases concluding in settlements or consent decrees, and thus discourages these favored mechanisms for resolving such litigation. The Court should use this opportunity to clarify *Farrar's* meaning and its relationship to catalyst theory.

4. Finally, the Court should not be fooled by respondents' other scattershot arguments as to why a fee award is improper under *Farrar*, even apart from the Eighth Circuit's anti-plaintiff gloss on *Farrar*. Respondents repeatedly assert that

"[p]etitioners never in fact 'defeated' the State's [*Aguilar*] defense" and that "[t]he constitutionality of the State's rule has never been decided" (Opp. 27 n.16), but, as noted above, these assertions are demonstrably false. The Eighth Circuit's merits opinion held, in sustaining liability against a co-defendant, that "Minnesota Rule 3525.1150 ... violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection." Pet. App. 122a-23a. This ruling explicitly rejected "[t]he only compelling interest identified by the State of Minnesota." Pet. App. 122a (rejecting the State's Establishment Clause defense).[7]

Equally misleading is respondents' argument that petitioners did not really "prevail" because the consent decree and injunction against the State "did not provide Petitioners the relief they sought," *i.e.*, the right to receive paraprofessional services at religious schools. Opp. 21. Because educational services in Minnesota are provided by local school districts, not by the State, that right could not have been granted by or against the State alone, nor could the State repeal the rule (enacted by the nonparty State Board of Education). *The most that could have been required of the State was what petitioners actually received – namely, a judicially enforceable requirement that the State would not enforce the rule against them and would promptly take affirmative steps to have it repealed.* This victory was significant not only because it ended the State's discrimination against these children, but also because it removed the key obstacle to the services they so desperately need.[8] Only this Court's intervention

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[7]This ruling was also essential to the Eighth Circuit's judgment against a co-defendant school district and thus cannot be dismissed as "dicta" (Opp. 10 n.7): If the State's rule was mandated by the Establishment Clause, it would not have been unconstitutional for the school district to follow that rule and refuse to provide on-site services.

[8]Indeed, Sarah's school district promptly agreed to provide on-site services once the State rule became unenforceable. The State emphasizes that Aaron's school district continued to litigate despite the rule's unenforceability but overlooks the facts that, as the Eighth Circuit held, the school district "conceded that it relied on Minnesota Rule

can ensure that petitioners' victory is not a Pyrrhic one and that proper incentives for civil rights enforcement are restored.

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The Petition for Certiorari should be granted, and the decision below set for plenary argument or summarily reversed. Alternatively, the Court should call for the views of the Solicitor General.

Respectfully submitted,

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3525.1150 when it denied services to Aaron ... and further conceded that Minnesota Rule 3525.1150 prevented it from providing services to Aaron." Pet. App. 123a. As recognized by both panels of the Eighth Circuit, the State's rule *mandated* such discrimination. *See* Pet. App. 115a ("Minnesota law prohibited school districts from providing [on-site] services at private religious schools."); Pet. App. 18a (acknowledging that this "is what the rule did"). The Eighth Circuit also held that "Minnesota Rule 3525.1150 explicitly discriminated against children who attended private religious schools" (Pet. App. 121a) and was motivated by "religious animus." Pet App. 126a. The State, therefore, shares responsibility for the infringement of petitioners' rights, and thus is jointly and severally liable for fees. *See Koster v. Perales*, 903 F.2d 131, 140 (2d Cir. 1990) (holding that "joint and several liability for attorneys fees ... is appropriate where the action or inaction of several defendants produces a single indivisible injury").